

THE HONORABLE JAMES L. ROBERT

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON**

DEXIA REAL ESTATE CAPITAL  
MARKETS, INC.,

Plaintiff,

vs.

STEPHEN A. KEMPH AND  
GREGORY M. CAZEL,

Defendants.

CASE NO.: 2:08-cv-00894-JLB

Consolidated with

CASE NO.: 2:08-cv-00895-TSZ

STEPHEN A. KEMPH AND  
GREGORY M. CAZEL,

Defendants/Third-Party Plaintiffs,

vs.

ROBERT K. RILEY, Individually, and the  
marital community thereof, GUY COOLS,  
Individually, and the marital community  
thereof, and LES KUTAS, Individually,  
and the marital community thereof,

Third-Party Defendants.)

**GREGORY M. CAZEL AND  
STEPHEN A. KEMPH, JR.'S RULE 12(f)  
MOTION TO STRIKE DEXIA'S FIRST,  
SIXTH AND EIGHTH  
AFFIRMATIVE DEFENSES AND  
MESSRS. RILEY, KUTAS AND  
COOLS' FIRST, FIFTH AND  
SEVENTH AFFIRMATIVE DEFENSES**

NOTE ON MOTION CALENDAR:  
FRIDAY, AUGUST 22, 2008

Gregory M. Cazel and Stephen A. Kempf, Jr. hereby move this Honorable Court  
pursuant to Federal Rule of Civil Procedure 12(f) to strike Dexia's first, sixth and eighth  
affirmative defenses and Messrs. Riley, Cools and Kutas' first, fifth and seventh

1 affirmative defenses. In support thereof, Messrs. Cazal and Kempf state as follows:

## 2 BACKGROUND

3  
4 Dexia and third-party defendants Messrs. Riley, Cools and Kutas filed answers  
5 and several purported affirmative defenses to the counterclaims and third-party  
6 complaints filed against them by Gregory M. Cazal and Stephen A. Kempf, Jr. Messrs.  
7 Cazal and Kempf filed responses of the purported affirmative defenses, denying the  
8 material allegations of each. Dexia's first, sixth and eighth affirmative defenses and  
9 Messrs. Riley, Cools and Kutas' first, fifth and seventh affirmative defenses are  
10 insufficient as a matter of law as they are either bare bones conclusory statements or  
11 they simply name legal theories without indicating how they are applicable to the  
12 subject lawsuit. Accordingly, the affirmative defenses should be stricken pursuant to  
13 Federal Rule of Civil Procedure 12(f).  
14

## 15 STANDARD FOR PLEADING AFFIRMATIVE DEFENSES

16  
17 An affirmative defense has been pleaded with sufficient particularity if it gives  
18 the party against whom the defense is asserted, "fair notice of the defense." *Wyshak v.*  
19 *City National Bank*, 607 F.2d 824, 827 (9th Cir. 1979). Affirmative defenses must set forth  
20 a "short and plain statement" but even under the "liberal notice pleading standard of  
21 the Federal Rules of Civil Procedure, an allegation must include either direct or  
22 inferential allegations respecting all material elements of the claim asserted." *Renalds v.*  
23 *S.R.G. Restaurant Group, et al.*, 119 F.Supp.2d 800, 801 (N.D.Ill. 2000). "Bare legal  
24 conclusions attached to narrated facts will not suffice." *Id.*

## 25 ARGUMENT

26 Dexia's First Affirmative Defense: Cazal/Kempf's Counterclaim/Amended  
27 Counterclaim fails to state a claim against Dexia  
28 for which relief may be granted.

Messrs. Riley, Cools and Kutas'  
First Affirmative Defense:

Cazel/Kemph's Third-Party Complaint fails to state a claim against Third-Party Defendants for which relief may be granted.

Dexia and Messrs. Riley, Cools and Kutas answered every count of the Cazel and Kemph counterclaims and third-party complaints. Neither Dexia nor Messrs. Riley, Cools and Kutas filed a motion to dismiss under Rule 12(b)(6) or any other pleading motion to dismiss. Yet, as their first affirmative defense, Dexia and Messrs. Riley, Cools and Kutas allege that the Cazel and Kemph counterclaims and third-party complaints fail to state a claim upon which relief may be granted. As alleged, the first affirmative defense provides no explanation as to how Cazel and Kemph have failed to state a claim upon which relief may be granted. This is especially true in light of that fact that Dexia and Messrs. Riley, Cools and Kutas answered every count of the counterclaims and third-party complaints. The first affirmative defense is "no more than a recitation of the standard for a motion to dismiss under Rule 12(b)(6)," and therefore it should be stricken. *Renalds v. S.R.G. Restaurant Group, et al.*, 119 F.Supp.2d 800, 803 (N.D.Ill. 2000).

Dexia's Sixth Affirmative Defense:

Cazel/Kemph's claims are barred, in whole or in part, by principles of waiver and estoppel.

Messrs. Riley, Cools and Kutas'  
Fifth Affirmative Defense:

Cazel/Kemph's claims are barred, in whole or in part, by principles of waiver and estoppel.

In this affirmative defense, Dexia and Messrs. Riley, Cools and Kutas simply list waiver and estoppel without providing any basis as to why those two purported defenses apply to the subject lawsuit. "It is unacceptable for a party's attorney simply to mouth out ADs in formula-like fashion ("laches," "estoppel," "statute of limitations,"

or what have you)" as doing so does not apprise opposing counsel or the court of the basis for the purported defenses, the goal of notice pleading. *State Farm Mutual Automobile Insurance Company v. Riey*, 199 F.R.D. 276, 279 (N.D.Ill. 2001). As no basis is pleaded for the waiver and estoppel affirmative defenses they should be stricken.

Dexia's Eighth Affirmative Defense:

Dexia asserts that it may have further and additional affirmative defenses, the nature of which cannot be determined until Dexia has had an opportunity to complete discovery.

Messrs. Riley, Cools and Kutas' Seventh Affirmative Defense:

Third-Party Defendants assert that they may have additional affirmative defenses, the nature of which cannot be determined until Third-Party Defendants have had an opportunity to complete discovery.

This purported affirmative defense is not a defense. *Federal Trade Commission v. Stefanchik*, No. C04-1852RSM, 2004 U.S. Dist. LEXIS 30710, at \*7 (W.D. Wash. November 12, 2004). By way of this alleged affirmative defense, Dexia and Messrs. Riley, Cools and Kutas are merely attempting to reserve their right to raise additional affirmative defenses later in these proceedings. *Id.* If at some point Dexia and Messrs. Riley, Cools and Kutas later discover evidence giving rise to an affirmative defense, the proper procedure is for them to seek leave of court to file an amended answer. *Id.* Thus, this purported affirmative defense should be stricken.

WHEREFORE, Gregory M. Cazal and Stephen A. Kempf, Jr., respectfully request that this Honorable Court enter an order striking Dexia's first, sixth and eighth affirmative defenses to the counterclaims of Messrs. Cazal and Kempf and stricken Messrs. Riley, Cools and Kutas' first, fifth and seventh affirmative defenses to the third-

1 party complaints of Messrs. Cazel and Kempf and requiring them to file amended  
2 answers and affirmative defenses not including the affirmative defenses at issue in this  
3 motion.  
4

5 Dated this 12<sup>th</sup> day of August, 2008

6 Segal McCambridge Singer & Mahoney, Ltd.

7 By: /s/ Robert J. McLaughlin

8 Robert J. McLaughlin, Esq., IL ARDC #6272701

9 Attorney for Gregory M. Cazel and Stephen A. Kempf, Jr.

10 GRANT & ASSOCIATES

11 By: /s/ Artis C. Grant, Jr.

12 Artis C. Grant, Jr., WSBA #26204

13 Attorney for Gregory M. Cazel and Stephen A. Kempf, Jr.  
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marital community thereof, GUY COOLS,  
Individually, and the marital community  
thereof, and LES KUTAS, Individually,  
and the marital community thereof,

Third-Party Defendants.)

) PROPOSED ORDER ON  
) GREGORY M. CAZEL AND  
) STEPHEN A. KEMPH, JR.'S RULE 12(f)  
) MOTION TO STRIKE DEXIA'S FIRST,  
) SIXTH AND EIGHTH  
) AFFIRMATIVE DEFENSES AND  
) MESSRS. RILEY, KUTAS AND COOLS'  
) FIRST, FIFTH AND SEVENTH  
) AFFIRMATIVE DEFENSES

ORDER

This matter coming before the Court on the motion of Gregory M. Cazal and  
Stephen A. Kempth, Jr. pursuant to Federal Rule of Civil Procedure 12(f) to strike

Dexia's first, sixth and eighth affirmative defenses and Messrs. Riley, Cools and Kutas' first, fifth and seventh affirmative defenses, IT IS HEREBY ORDERED:

(1) The motion to strike is granted;

(2) Dexia's first, sixth and eighth affirmative defenses to Messrs. Cazal and Kempf's counterclaims are stricken;

(3) Messrs. Riley, Cools and Kutas' first, fifth and seventh affirmative defenses to Messrs. Cazal and Kempf's Third-Party Complaint are stricken; and

(4) Dexia and Messrs. Riley, Cools and Kutas shall file amended answers and affirmative defenses within seven (7) days, said amended answers and affirmative defenses shall not include the affirmative defenses stricken pursuant to this order.

DATED this \_\_\_\_\_ day of August, 2008.

\_\_\_\_\_  
THE HONORABLE JAMES L. ROBART

Segal McCambridge Singer & Mahoney, Ltd.

By: /s/ Robert J. McLaughlin  
Robert J. McLaughlin, Esq., IL ARDC #6272701  
Attorney for Gregory M. Cazal and Stephen A. Kempf, Jr

GRANT & ASSOCIATES

By: /s/ Artis C. Grant, Jr.  
Artis C. Grant, Jr., WSBA #26204  
Attorney for Gregory M. Cazal and Stephen A. Kempf, Jr.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of August, 2008, I electronically filed Gregory M. Cazel and Stephen A. Kempf, Jr.'s Rule 12(f) Motion to Strike Affirmative Defenses, with the Clerk of the Circuit Court using the CM/ECF system which will send notification of such filing to the following:

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